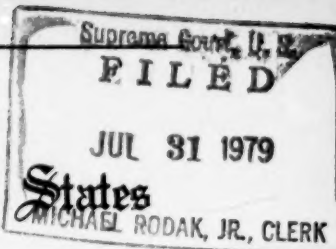


In The
Supreme Court of the United



October Term, 1979

No. **79-160**

EUGENE W. CONNELLY,

Petitioner,

vs.

COMMERCIAL TRADING CO., INC.,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION - FIRST DEPARTMENT**

EUGENE W. CONNELLY

for Petitioner

P. O. Box 207

10 Bayberry Drive

Plainview, New York 11803

(516) WE 1-6774

TABLE OF CONTENTS

	<i>Page</i>
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	2
Statement of the Case	3
Preface	3
Background	8
Proceeds	20
<i>The Philadelphia Action American v. Ideal Shoe Co.,</i> U.S. District Court for Ea. Pa. — Civil Action No. 71- 856	21
Perjury Papers	23
Summary Judgment	24
Trial Court's "Findings of Fact and Conclusions of Law" .	25
Trial Court's Decision	26
The "Affirmation" of the Appellate Division	29
Respondent's Motion For Discontinuance	30
The Uniform Commercial Code	32

ii
Contents

	<i>Page</i>
Lawsuits Which Resulted From This Infamous (1968) Action	35
Reasons For Granting the Writ	38
Trial	38
Uniform Commercial Code	40
Conclusion	41

TABLE OF CITATIONS

Cases Cited:

Citizens Valley Bank v. Pacific Materials Co., Or. 503 P.2d 491	7
Gould v. Pollock, 68 Misc. 2d 670, aff'd, 71 Misc. 2d 344 ...	24
Harry Ohringer Inc. v. Kass, 28 A.D. 2d 1117	25, 39
Jerome v. Lewis, 32 A.D. 2d 648	25
Kohlmann v. City of New York, 184 N.Y.S. 2d 357, 8 A.D. 2d 598	39
Levitz v. Robbins Music Corp., 17 A.D. 2d 801	25
Progressive Co. v. Mt. Vernon Clock Corp., 5 A.D. 2d 166	25, 39
Public Service v. McGrath, 56 A.D. 2d 812	29

iii
Contents

	<i>Page</i>
Rosemont Enterprises, Inc. v. Irving, 49 A.D. 2d 445	29
Salzman v. Sakofsky, 89 N.Y.S. 2d 39	39
Statutes Cited:	
28 U.S.C. §1257(3)	2
UCC (1972) Official Text, General Comment, p. xvii	40
UCC 2-201(1)	21
UCC 3-104(2)(d)	7
UCC 9-105(d)	35
UCC 9-106	33, 40
UCC 9-203	4, 5
UCC 9-204	4, 5
UCC 9-305	34
UCC 9-306	34
UCC 9-306(3)	40
UCC 9-309	6, 33
UCC 9-318	32

Contents

Page

Other Authorities Cited:

The International Chamber of Commerce, Brochure No. 222	40
Handbook of the Law Under the Uniform Commercial Code, (Hornbook Series, White and Summers, West Pub.) Ch. 23-4, p. 791	6
Dillavous and Howard, Principles of Business Law, (8th Edition, Prentice Hall) Ch. 27, 3-139, p. 399	7

APPENDIX

Opinions in the Lower Courts	1a
Trial Court's "Findings of Fact and Conclusions of Law"	2a
The "Non-Order" Memorandum Decision of Judge Rosenberg	7a
Order of Judge Grossman Denying Summary Judgment to Respondent	10a
Order of Judge Grossman Granting Motion for Preference to Petitioner	12a
Complaint	14a
Statutes Involved	22a

In The

Supreme Court of the United States

October Term, 1979

No.

COMMERCIAL TRADING CO., INC.,

Respondent,

vs.

AMERICAN EAST INDIA CORPORATION and EUGENE
W. CONNELLY,*Petitioners.*

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION — FIRST DEPARTMENT**

The petitioners, American East India Corporation and Eugene W. Connelly, proceeding individually, respectfully pray that a writ of certiorari issue to review the order of the Supreme Court of the State of New York, Appellate Division, First Department, entered in the above entitled case on November 21, 1978.

OPINION BELOW

The findings of fact and conclusions of law of the trial court, Part 18, Supreme Court of the State of New York, New York County appears in the Appendix hereto.

The decision of the trial court was affirmed by the Appellate Division without opinion.

Subsequent motions for leave to appeal to the Court of Appeals were denied without opinion.

JURISDICTION

The final denial of the New York State Court of Appeals was entered May 3, 1979. This petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

Whether the petitioners are entitled to be heard at trial on the facts and law of this case.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provision involved in this case is the Uniform Commercial Code which applicable sections are set forth in the Appendix, *infra*.

STATEMENT OF THE CASE

Preface

Respondent Commercial Trading Co., Inc. ("Commercial") is a commercial financing factor. American East India Corporation ("American") was an importer of shoes. Eugene W. Connelly ("Connelly") was the president of American from activation (1955) through 1974. On October 17, 1974, all rights of American in this action were assigned to Connelly. On April 1, 1976, Connelly was added as party defendant. Walker Trading Corporation ("Walker"), from December 1967 onwards, was a sales agent of American. Prior to December 1967, Walker was a shoe importer financed by Commercial.

In December 1967, sales agent Walker assigned to American four contracts previously entered into, with shoe manufacturers in Taiwan, Japan and Hong Kong. American established letters of credit through their bankers in favor of the shoe manufacturers. American imported the shoes and delivered them to thirty-seven customers to create accounts receivable of \$163,072.02, of which the two largest were C.R. Anthony Co., ("Anthony") (\$66,363.11), and the Ideal Shoe Co. ("Ideal") (\$27,542.40).

By summons and complaint (Appendix, *infra*, 14a), Commercial initiated this instant action in April 1968, alleging (a) that from their former association, Walker was in debt to Commercial in an amount of \$310,000, (b) that Walker owned the goods imported, and (c) because of previous filings under the Uniform Commercial Code, Commercial had a security interest in the proceeds superior to American's interests. Hereinafter, the lawsuit will be referred to as "New York Action No. 1".

Respondent Commercial had no standing to initiate the action. Respondent Commercial never had a security interest in the proceeds.

Under the Uniform Commercial Code, petitioner American's protection was total, absolute and superior.

Respondent Commercial *did* have properly filed Walker/Commercial Accounts Receivable Security Agreements (see Appendix, 14a, par. 5) but neither Walker nor respondent Commerical held a single document of title.

American held every document of title. In a related case (see p. 21, *infra*) a court was to find:

"Summarizing, all the documents involved in the transaction indicated American as the importer for its own account." (400 F. Supp. 153).

That decision referred to the single *Ideal* account receivable. That *Ideal* receivable was one of the 37 accounts receivable at issue in this instant action. All 37 accounts receivable were developed from one series of letters of credit, one series of shipments from manufacturer's contracts assigned to American by sales agent Walker.

The complaint in this action (Appendix, *infra*, 14a) demanded a single "declaratory judgment" as to the "ownership of said accounts receivable" as a single unit (Appendix, 18a, par. 15). There was no difference between *Ideal* and the other 36, other than the fact that *Ideal* made a secret deal with respondent Commercial to discount American's invoices which forced American's independent action.

The 1975 finding (400 F. Supp. 153), carried back to the 1968 complaint, would hold, conclusively, under the Uniform Commercial Code, UCC 9-203, that respondent Commercial had no standing to initiate this instant action and, under UCC 9-204, that at no time did respondent Commercial have a security interest in the proceeds.

"UCC 9-203. Enforceability of Security Interests.

(1) . . . a security interest is not enforceable against the debtor *or third parties* [emphasis added] unless:

(a) the collateral is in the possession of the secured party; or

(b) the debtor has signed a security agreement which contains a description of the collateral"

"UCC 9-204. When Security Interest Attaches.

(1) A security interest cannot attach until there is agreement that it attach and value is given and the debtor has rights in the collateral. It attaches as soon as all of the events in the preceding sentence have taken place"

Legal textbooks confirm, explicitly, that under UCC 9-203 and 9-204, Commercial had neither (a) standing to initiate the action against American, nor (b) a security interest to maintain the action:

"Two parties may have an agreement for security under 9-204(1) and they may reduce it to writing to the extent necessary to comply with 9-203(1)(b). *Even so*, the security interest they intend to create will not come into being until two additional events occur: the debtor *must* acquire rights in the collateral, and the secured party must give value. When these events occur, the security interest will 'attach' under 9-204(1), and *not until it thus 'attaches' to specific*

collateral can the interest come into being." (Emphasis added.) *Handbook of the Law Under the Uniform Commercial Code*, (Hornbook Series, White and Summers, West. Pub.) Ch. 23-4, p. 791.

Every document of title to the goods was negotiated to petitioner American by their bankers, and in that same related case, *supra*, the court found:

"In this case, the documents required under the letter of credit were invoices, a customs invoice 5523 — material breakdown, and ocean bill of lading with notification to American.

On or about January 24, 1968, these documents were delivered to American by Bank of America" (400 F. Supp. 151).

Again, respondent Commerical *did* have their filings, but petitioner American had total protection under the Uniform Commercial Code, inferior to nothing.

"UCC 9-309. Protection of Purchasers of Instruments and Documents.

Nothing in this Article limits the rights of . . . a holder to whom a negotiable document of title has been duly negotiated and such holders or purchasers *take priority over an earlier security interest* even though perfected. *Filing under this Article does not constitute notice of the security interest to such holders or purchasers.*" (Emphasis added.)

Legal textbooks confirm the protection of "possession" over "filing":

"The possession of the collateral by the secured party gives notice of his security interest — hence no public filing is required.

Possession is the required method of perfection of a security interest in instruments and is the optional method in the case of collateral consisting of goods, negotiable documents of title and chattel paper. However, *possession is the only method whereby complete protection in documents and chattel paper can be obtained* since: (1) the rights of holders to whom a document has been negotiated by the debtor will prevail over the secured party, *even though there has been a filing.*" (Emphasis added.) Dillavous and Howard, *Principles of Business Law*, (8th Edition, Prentice Hall) Ch. 27 3-139, p. 399.

The strong priority of "possession" over "filing", and particularly the absolute protection of UCC 9-309, was evident in *Citizens Valley Bank v. Pacific Materials Co.*, Or. 503 P.2d 491. A promissory note [UCC 3-104(2)(d)] had been negotiated to defendant Pacific. Like Commercial in this instant action, the plaintiff Citizens Bank claimed priority because of an earlier "filing." Like American, herein, defendant Pacific claimed priority because of "possession." The court held for the defendant, ruling:

"The defendant counters that ORS 79-3090 does 'otherwise provide' and we agree.

ORS 79.3090 states:

'Nothing in ORS 79.1010 to 79.5070 (Article 9) (added) limits the rights of a holder in due course of a negotiable instrument or a holder to whom a

negotiable document of title has been duly negotiated as provided in ORS 77.5010, or a bona fide purchaser of a security as provided in ORS 78.3010 and such holders or purchasers take priority over an earlier security interest even though perfected'

We have found no precedents from other jurisdictions or any statements by the writers precisely on this issue. The wording of the statute, however, seems clear: '(S)uch holders or purchasers take priority over an earlier security interest even though perfected.

Affirmed."

This action should have ended, summarily, in April 1968.

Background

Instead, petitioner American's law firm, in total confusion in the Uniform Commercial Code, "counseled" that respondent Commercial's secured interest was superior because Commercial had "filed", and American had not. Counsel recommended that American "settle" (even though respondent Commercial had not put up a penny to import the goods). Connelly, as president of American, refused. The following is a capsulized summation of the past tragic eleven years that has gotten us to this point and date.

1967

Nov. 17 Commercial established final letter of credit (L/C 69401) to end the four-year financing of Walker imports (1964-67).

Dec. 18 American hired Walker as sales agent.

Dec. 20 Commercial made final bank acceptance (\$4,682.13) to end financing.

1968

Jan. Commercial took over all Walker accounts payable, to pay bills, and close out the account.

Feb. 5 With knowledge and cooperation of Commercial, William Lynn ("Lynn") president of Walker, incorporated new company (Walker International Corporation) with new financing factor (A.I.C. Financial) one of whose officers was former Commercial employee.

Feb. 14 Commercial learned of American's imports (*supra*, bottom p. 3). Commercial could not check with Lynn (out of country) but, in the belief Lynn had obtained temporary financing from American during interim period of Commercial dropping the Walker account (December 1967) and A.I.C. Financial picking it up (February 1968), Commercial sent telegrams and letters to *all known* customers of Walker, threatening them with having to make double payment if they paid any money against goods received from Walker to any party other than Commerical.

Feb. 28 Lynn returned from Far East. Learned of Commercial's telegrams and letters from customer (C.R. Anthony). Informed American, for first time, about Commercial.

Mar. 1 Commercial paid Lynn \$1,000.

Apr. 14 Commercial initiated this instant action.

May 20 Commercial paid William Lynn, \$500.

May 22 Commercial conducted deposition of Lynn.

Aug. 1 Commercial paid Lynn \$2,000.

1969

Jan. 15 Commercial continued Lynn deposition.

Mar. 7 Lynn deposition.

Mar. 19 Lynn deposition.

May 7 Lynn deposition.

May 22 Lynn deposition.

May 29 Parties agreed to place two largest accounts (Anthony and Ideal) *supra*, p. 3) in bank escrow account subject to withdrawal upon final judgment or order of court. Anthony money paid into account, but when Ideal attempted to discount payment, Connelly refused to permit money into the account.

June 4 Commercial continued Lynn deposition.

June 10 Lynn deposition.

1970

Jan. 29 Lynn deposition.

Feb. 12 Lynn deposition.

Feb. 12 Ideal paid Commercial \$24,000, discounting American's invoices by 13%, and received indemnification in event American sued Ideal.

Mar. 11 Commercial conducted deposition of Connelly.

Mar. 26 Connelly deposition.

June 11 Connelly deposition.

July 2 Connelly deposition. For first time, Connelly learned of Ideal's secret payment to Commercial (*supra*, Feb. 12, 1970).

1971

Apr. 8 American initiated action against Ideal (Referred to as the "The Philadelphia Action" (more *infra*, p. 21).

June 3 Commercial conducted deposition of Henry J. Baccash ("Baccash") American's controller.

June 10 Baccash deposition.

Sept. 13 American sued Commercial for \$1.5 million each in three causes of action — fraud, inducing breach of contract and conversion (referred to as "New York Action No. 2").

1972

Feb. 8 American's attorney in Philadelphia handling the Philadelphia Action requested from American's New York attorney all depositions held in New York Action.

Feb. 9
and 16

American's attorney finally held first, and only, deposition in this case, that of Gerald Grossman ("Grossman"), vice president and general counsel of respondent Commercial. Grossman told a story, later repeated almost word for word in testifying at the Philadelphia Action trial, that Commercial financed Walker from 1964 to July 1967; that in July 1967 Walker applied for two letters of credit totalling \$54,000; that because Walker was heavily in debt to Commercial, Commercial refused to establish the letters of credit during the period July through December 1967, unless Walker put up \$27,000 "margin" to support the credits, which Walker could not, and did not, do. (400 F. Supp. 149).

Dec. 8 Respondent Commercial moved for summary judgment:

"... on the grounds that there is no defense to such cause of action and that the same has been established sufficiently to warrant the Court as a matter of law in directing judgment in favor of plaintiff."

American's law firm conceded the law, but defeated the motion by convincing the court that there were two factual issues for trial (both subsequently proven in plaintiff's favor).

1973

March
Term

Respondent Commercial appealed summary judgment denial to Appellate Division, First Department. Lower Court was affirmed.

May 15

Trial in Philadelphia Action started; seven (7) days testimony and argument over a 46-day period, through June 29, 1973. Decision reserved for more than two years and rendered July 16, 1975 (more, *infra*, p. 21).

June
and
onwards

American made independent study of law and Walker/Commercial financing association from 1964 through December 1967.

Nov. 1

With knowledge of attorneys, Connelly obtained opinion from another law firm. Was told that action could be dismissed by summary judgment under UCC 9-309 (*supra*, p. 6). American's law firm refused to move.

1974

May

Respondent Commercial's attorney replaced by Weil, Gotshal & Manges ("Weil Gotshal").

July 16

Connelly, for American, completed year-long study, prepared and had copies delivered to attorney and Grossman of Commercial, a document intended for the New York County District Attorney, "In Support of a Summons For Perjury Against Gerald Grossman, V.P., Commercial Trading Co., Inc.," (referred to as "Perjury Papers") detailing seventeen (17) perjured statements of Grossman at his deposition (*supra*, p. 12) and Philadelphia Action trial (*infra*, p. 21).

July 18

American's attorneys advised they were withdrawing from case. Result of association: In 1968 made quick decision, respondent was correct on

law, so held one deposition in New York Action No. 1; no depositions in New York Action No 2; made no effort to get either action to trial — received legal fees, \$81,535.12. Another law firm was hired (September 1st).

Oct. 17 American assigned to Connelly all interests in the two New York Actions and the Philadelphia Action.

Nov. 24 New York Action No. 1 — American and Commercial, moved and cross-moved for summary judgment (both denied).

New York Action No. 2 — Commercial moved for summary judgment dismissal (statute of limitations) (granted).

Perjury Papers — Grossman *et al.* initiated action against Connelly *et al.* (\$20,000,000) (more *infra*, p. 23).

Dec. 11 American dropped second law firm. Three month's legal fees, \$20,312.50 (retainer — \$15,000; services — \$5,312.50). Third law firm hired.

1975

July 16 Decision rendered in Philadelphia action (*infra*, p. 21).

1976

Jan. 31 Respondent Commercial moved for summary judgment on Anthony escrowed account receivable (*supra*, May 29, 1969, p. 10), exhibited Philadelphia Action decision and claimed collateral estoppel and *res judicata*.

American opposed, stressing (a) lawsuit was in 8th year and trial date was only three weeks away (February 23, 1976) and (b) exhibited documented proof from the Perjury Papers to expose the Grossman perjury which gained Commercial the favorable decision in the Philadelphia Action.

Feb. 20 After three law firms over an eight-year period had failed to get this action to trial, and in belief it never would get to trial, through efforts of attorneys, Connelly moved to be substituted as the party of interest, replacing American.

April 1 Connelly substitution motion granted "to extent of adding Connelly as party defendant."

Commercial's January 31st motion for summary judgment granted but signing of order held pending submission of additional affidavits, and never signed into order (Appendix, *infra*, 7a) (more, *infra*, p. 24).

1977

Nov. 18 Petitioner Connelly moved for trial by preference (granted).

1978

Jan. 8 Over ten-year period, not one attorney informed petitioners that the answer in the action did not contain any counterclaims or requests for affirmative relief of any type.

Prior to assignment to a Trial Part, petitioner Connelly moved for an order to permit an amended answer containing a counterclaim (denied).

Feb. 21 Case assigned to Trial Part 18, and heard over three days (more, *infra*, p. 26).

April 24 Final judgment entered, awarding 77.2% of proceeds to petitioner, 22.8% to respondent.

November Term Petitioners appealed to Appellate Division, First Department of the New York State Supreme Court limiting the appeal strictly to the law. The "Questions Involved" stated, in toto:

"the questions involved on this appeal are:

1. Did the plaintiff-respondent have standing to initiate this action in 1968?

The Uniform Commercial Code says they did not!

2. Does the plaintiff-respondent have a secured claim on any proceeds at issue in this action?

The Uniform Commercial Code says they do not!"

Petitioners "Argument" held strictly to the law, and the "Questions Involved":

1. Re "standing". Petitioners' Appendix included every document of title, all in petitioners' name. As, at no time, did the respondent, or

any other party possess the documents of title, UCC 9-203 was quoted to "prove" that the respondent had no standing to initiate the action (refer *supra*, p. 4).

2. Re "secured claim". Petitioners' Appendix included the letters of credit established to purchase the footwear, plus the "instrument" (bank draft) and documents of title negotiated to petitioner by the banks. UCC 9-309 was quoted to "prove" that "nothing" in the Code was superior (refer *supra*, p. 4).

Nov. 21 Lower court affirmed, without opinion.

Dec. 5 Petitioner moved for reargument in the Appellate Division, stating that:

"... by its decision, the Court:

a. has set a precedent by which the dishonest can collect commercial-trade proceeds despite protections set up by the financial industry to thwart such attempts;

b. has set a precedent by which the dishonest can collect commercial-trade proceeds despite protections enacted by the New York State Legislature to thwart such attempts;

c. has ruled contrary to present law;

d. has ruled contrary to prior decision;

e. has granted an award in excess of the demands of the plaintiff's Complaint, and

f. has permitted a gratis award to the plaintiff."

and expanded on each point.

1979

Jan. 11 Motion for leave to reargue denied.

Feb. 5 Petitioner moved for leave to appeal to the New York Court of Appeals requoting the law that respondent Commercial had no standing to initiate this action (UCC 9-203) and "nothing" was superior to petitioner American's "possession" of the negotiated documents of title (UCC 9-309), and expanded the petitioner's brief to expose blatant lies of three attorneys to deceive the courts:

a. Grossman, general counsel of Commercial, to gain the favorable decision in the Philadelphia Action (*infra*, p. 21).

b. Respondent Commercial's attorney to deceive the trial court that the Philadelphia Action decision should be *res judicata* in this action to prevent a trial on facts and law (*infra*, p. 23).

c. Respondent Commercial's attorney to deceive the Appellate Division to affirm the trial court (*infra*, p. 25).

Apr. 3 The laws and lies meant nothing, the motion for leave to appeal was denied; no opinion.

Apr. 23 Motion for reargument to Court of Appeals:

"Purpose of Instant Motion

In a system of practice of law and court decisions which relies so heavily on 'precedent' decisions, by denial of appellant's motion for leave to appeal, this Court has let stand a decision which denied to the defendants, and could to future honest defendants, the protection of New York State laws created by this State's Legislature to protect against the very type of dishonest practice perpetrated by the plaintiff, and their attorneys, to convert proceeds to which they had no honest, factual or legal right.

If the laws of this State are to be respected, and full protection of the law guaranteed to commercial interests of this State, the decisions in the lower courts must be reversed."

May 3 Motion for reargument denied, no opinion, \$20 costs.

Interspersed in the above were scores of motions; a number of additional lawsuits initiated; a referee's hearing; more than twelve postponed trial and pre-trial conference dates — all of which could have been, and should have been, avoided if the protection of the Uniform Commercial Code had been invoked in 1968 and this lawsuit dismissed aborning by summary judgment.

Of further importance to the Statement of the Case, and the possible understanding of this infamous lawsuit, might be the following:

Proceeds

Although the complaint, par. 8 (Appendix, 16a) stated the accounts receivable at issue to be "approximately \$200,000", the actual breakdown was as follows:

\$66,363.11	C.R. Anthony Co. — One account receivable placed in escrow (<i>supra</i> , p. 10)
\$27,542.40	Ideal Shoe Co. — One account receivable, the subject of the Philadelphia Action (<i>infra</i> , p. 21)
\$68,489.96	35 miscellaneous "third person" accounts collected by Commercial (6) and American (29)
<hr/>	
\$162,395.47	— total

The Philadelphia Action American v. Ideal Shoe Co., U.S. District Court for Ea. Pa. — Civil Action No. 71-856

In 1968, after receiving promise of payment, American shipped, and invoiced, to Ideal \$27,542.40 of footwear. Ideal withheld payment, and in February 1970 made secret payment (\$24,000) to Commercial in return for indemnification in event American sued. American sued in April 1971.

Trial started May 15, 1973 with seven days testimony and argument over a 46-day period, through June 29, 1973. Commercial defended for Ideal. American exhibited documents of title, and demanded payment. Commercial interjected the New York Action No. 1, and claimed a right to the proceeds because of "filing" under the Uniform Commercial Code. Grossman, general counsel for Commercial, testified and told a totally perjured story of a huge Walker to Commercial debt; of Commercial refusing to establish a \$54,000 letter of credit because of Walker's inability to put up \$27,000 "margin"; and of refusing to finance any Walker letters of credit after August 1967 (400 F. Supp. 149) (more, *infra*, *Perjury Papers*).

The court deferred a decision for more than two years. During the interim, Connelly, for American, made a study of the law and the Walker/Commercial financing history.

On July 16, 1975 the court awarded American \$20,471, less \$839.64 for damaged goods (\$19,631.36), plus interest. Commercial was awarded \$7,071.40, the court ruling American had converted a "contract right." It was a rather unique decision, as "contract rights" can exist only in contracts and no one from either side could exhibit a contract. Couldn't, for the simple reason that no contract existed. American had shipped their goods against a promise to pay. To be actionable, a contract must be a writing and *signed* [UCC 2-201 (1)].

- 7-28-75 American's attorney filed a motion to amend court's findings of fact, to make additional findings of fact for a new trial to the extent necessary to make such findings, to amend conclusions of law and to amend the judgment.
- 7-29-75 American's attorney served, *untimely*, a copy of the motion to amend, etc. on Commercial's attorney.
- 8-1-75 Affidavit of Eugene W. Connelly in support of plaintiff's motion to amend, etc. delivered to court's chambers.
- 8-1-75 Motion to amend, etc. denied.
- 8-14-75 Commercial filed notice of appeal to the U.S.C.A. 3rd Cir.
- 11-7-75 American moved in U.S.C.A. to dismiss appeal by Commercial "on the grounds that the appeal is frivolous."
- 11-24-75 Commercial filed "Appellant's Motion For Voluntary Dismissal of Appeal."
- 12-10-75 Court granted Commercial's motion for dismissal of appeal.

Despite the clear record and facts of Commercial's withdrawal of their appeal, in a desperate effort to keep this instant action from going to trial on merits and law and make the Philadelphia Action decision *res judicata* in New York, a Commercial attorney told the trial judge:

"May I mention that the Philadelphia decision had been appealed to the Third Circuit, and the Third Circuit unanimously affirmed the decision of Judge Green." (T24) (400 F. Supp. 141).

To save costs, American did not appeal the 1975 *Ideal* ruling preferring to recover in this earlier 1968 action in which the *Ideal* account receivable is a vital part.

Perjury Papers

Connelly's post-Philadelphia Action trial discovery disclosed that Grossman had perjured himself at least 17 times at trial and the single deposition in this action. Where he had testified at trial (400 F. Supp. 149) that Commercial had refused to finance a \$54,000 letter of credit because of Walker's inability to put up \$27,000 "margin", the truth is that Commercial *purchased* Walker's accounts receivable, *never* refused a single Walker letter of credit for want of "margin" and where Grossman testified that *no* letters of credit were financed after "August of 1967", the truth is that seven were established totalling \$76,500 and, with overdrafts, \$157,588.10 financed against them.

Connelly prepared a paper detailing the perjury. A copy was sent to Grossman. Grossman initiated an action (details, *infra*, p. 36) to have Connelly appear for deposition "to aid Grossman . . . in bringing a cause of action against Connelly. . . ." Connelly defaulted on papers intentionally in order to appear; did appear; produced 56 exhibits to substantiate the perjury accusations; was deposed on January 29, 1975. To date, no further action has been taken.

Summary Judgment

There are thirty-seven (37) accounts receivable at issue in this action (*see Proceeds, supra*, p. 20).

On December 8, 1972, respondent Commerical moved for summary judgment on all thirty-seven accounts receivable. Motion denied.

On January 31, 1976, respondent Commercial moved for summary judgment on the single *Anthony* account receivable. Motion granted by memorandum decision (Appendix, 7a) but never signed into order (J. Rosenberg).

On September 9, 1977, respondent Commercial moved for summary judgment on "thirty-four (34) 'third person' accounts." Motion denied (J. Grossman).

On November 11, 1977, respondent Commercial again moved for summary judgment on "thirty-four (34) 'third person' accounts." Motion denied (J. Grossman).

Though Judge Rosenberg granted summary judgment on the single *Anthony* account receivable, he never signed his decision into an order. Judge Rosenberg retired in December 1976. This action was assigned to Judge Grossman who refused to sign the Judge Rosenberg decision into an order. (*Where no order was entered* on first judge's decision (now out of court), the second judge was not bound by the first judge's decision — *see, Gould v. Pollack*, 68 Misc. 2d 670, *aff'd*, 71 Misc. 2d 344.

Not only did Judge Grossman refuse to sign the Judge Rosenberg decision into an order, but in denying respondent Commercial's November 11th motion for summary judgment on the "third person" accounts, he stated:

"Plaintiff renews its cross motion for summary judgment under the principles of collateral estoppel. There is no cause of action in the complaint seeking recovery under principles of collateral estoppel and summary judgment is not available on an unpleaded claim." *Progressive Co. v. Mt. Vernon Clock Corp.*, 5 A.D. 2d 166; *Harry Ohringer Inc. v. Kass*, 28 A.D. 2d 1117.

"Furthermore, plaintiff had made a motion for summary judgment on its complaint. It cannot make successive motions for summary judgment thereon." *Jerome v. Lewis*, 32 A.D.2d 648; *Levitz v. Robbins Music Corp.*, 17 A.D.2d 801.

Plaintiff-respondent Commercial's motions for summary judgment on the single *Anthony* and 34 "third person" accounts receivable were based on the decision of Judge Green in the Philadelphia Action (400 F. Supp. 141). Despite the facts of (a) Judge Rosenberg not signing his decision into an order, and (b) the clear, unambiguous, language of Judge Grossman in denying the summary judgment motions, in a desperate effort to keep this action from trial on merits and law and have the trial court's decision affirmed, Commercial's attorney stated in his respondent's brief to the Appellate Division:

"Moreover, Judge Green's finding was adhered to without exception by Mr. Justice Rosenberg, Mr. Justice Grossman and Mdme. Justice Shainswit below."

Trial Court's "Findings of Fact and Conclusions of Law" (Appendix, *infra*, 2a).

At trial, the court gagged the petitioner's into limiting testimony to a single performance (costs to import goods) and

barred the petitioners from placing into evidence any *law* and any *exhibits* to prove a total secured interest in the proceeds at issue:

"Proceeding then with the determination of the *sole issue* (emphasis added) left to be tried, I urged Mr. Connelly to present his former company's costs in filling the Anthony account." (Appendix, *infra*, 5a).

The Findings are replete with (a) statements that are completely false, (b) statements that are completely opposite from the truth, and (c) statements of "facts" that simply never happened. The trial court did not credit the sources for the "Findings", but *if the statements had been made from the witness stand*, each of them could have been challenged by the defendants, and the truth brought to surface.

Trial Court's Decision

The trial court's Findings (Appendix, *infra*, 2a) starts:

"This decision finally puts at rest — hopefully — an inordinately complex, 10-year old, series of lawsuits."

The court did have an opportunity to put the "10-year old series of lawsuits" at rest, but failed, tragically. If the court had opened the trial with:

"Gentlemen, you have been waiting ten years to get this case to trial, have at it,"

the case could have been over in ten minutes, a minute per year, or less.

"MR. CONNELLY: Your Honor, all I am saying is that my testimony in this case, if we are allowed to proceed, will be no longer than five minutes. I think I could talk for fifteen minutes and waste your time, whereas five minutes on the stand could end this whole case." (T36).

The petitioners asked to be heard on the complaint, and were refused:

"MR. CONNELLY: It is because I was granted a motion for preference for my case to be heard because there has been no order signed in this lawsuit. They brought a complaint against me. Why should they not have to take that complaint and be heard on it?" (T32).

MR. CONNELLY: I read from their complaint, paragraph 15 (Appendix, *infra*, 18a) (added) 'Because of the dispute that presently exists as aforesaid between plaintiff and defendant American with respect to the ownership of said accounts receivable and the right to receive payment thereof, a judicial determination of such dispute is desirable and necessary.' That is all I am asking for, what their complaint says." (T34).

The petitioners asked to be heard on the law, and were refused:

"MR. CONNELLY: Yes, Your Honor. During the year 1977 I sent several letters to Judge Dudley (Administrative Judge) (added). I reminded Judge Dudley that this case was on the books for nine years. I suggested to Judge Dudley that I could get this case off the books within half an hour to half a day if I could go to trial. I said the same —

THE COURT: You have had your trial, Mr. Connelly.

MR. CONNELLY: I asked for a five minute trial before Judge Rubin (Assignments Part) (added).

THE COURT: Mr. Connelly, you have had three days now. Anything else you want to say?

MR. CONNELLY: I would like to read the law in (to the record) on which I based my case.

THE COURT: No, sir. All right, gentlemen." (T197).

At the outset, the court obtained confirmation that Judge Rosenberg's memorandum decision (Appendix, *infra*, 7a) had not been signed into an order:

"THE COURT: Please proceed, counsel. One thing I want to say, there was no order entered on Judge Rosenberg's opinion, am I correct?

MR. LEMBERGER (plaintiff attorney): Correct.

THE COURT: There is no decision therefor. You will have to present to me your claim and the reasons why you believe the Philadelphia decision is res judicata. Then we will have this Defendant present to me, if I choose to follow the Philadelphia decision. Mr. Connelly will then present to me his figures on his costs, and I will do the allocating, if I decide to do it and follow the Philadelphia decision.

MR. LEMBERGER: Your Honor, may I say I am a little unprepared for this disposition." (T37).

The court then bowed to the respondent's refusal to put a single witness on the stand, refusal to put a single document in evidence. The petitioners were restricted to three days of tediously putting cost figures to import shoes on the record. The petitioners were awarded those costs, the respondent awarded the profits despite the facts (a) they had not put up a penny to earn them and (b) had no legal right to them.

Although not to the extent originally intended, the respondent's attempted conversion coup of 1968 had succeeded—because the court refused to hear the facts, and refused to hear any part of the Uniform Commercial Code which provided specific protection against the very type of commercial thievery perpetrated by the respondent.

The "Affirmation" of the Appellate Division

The court's failure to render an opinion raises the perplexing question: What did they affirm? By its final judgment the trial court granted respondent Commercial summary judgment.

Did they affirm that the trial court was correct in disregarding the prior opinion of Judge Rosenberg that "there is no cause of action in the complaint seeking recovery under the principles of collateral estoppel and summary judgment is not available on an unpleaded claim" (*supra*, p. 25), but that would be contrary to *Rosemont Enterprises, Inc. v. Irving*, 49 A.D. 2d 445 and *Public Service v. McGrath*, 56 A.D. 2d 812 which held that "with certain exceptions, not here relevant, a judge should not generally pass upon or review a matter already passed upon by another judge of equal authority or coordinate jurisdiction."

Possibly an opinion would have cleared up a glaring inconsistency. The court had for review, a copy of the trial transcript, and the trial court's "Requests for findings, etc." (Appendix, *infra*, 2a). Both will confirm that no respondent witness testified, no proof or exhibit of any kind was evidenced by the respondent (nor was a Respondent's Appendix submitted in the appeal) and the trial court stated, correctly, in the findings that the *sole issue* "tried" was the defendant's submission of cost figures to import footwear (*supra*, p. 25).

But, how could the court reconcile the "findings" with the final judgment which stated, in pertinent part:

"The issues in this action, which is an action for a declaratory judgment seeking to declare the respective rights of the parties with regard to the receipt of payment of certain accounts receivable having duly come on to be heard . . . on the 21st, 22nd and 23rd days of February, 1978, and the issues having been duly tried on those days . . . and the proofs of both parties having been adduced and their respective counsel having been heard. . . .?"

Respondent's Motion For Discontinuance

The trial court was consistent only in its disregard for the complaint in the action. Where the trial court disregarded the opinion of Judge Grossman that summary judgment was unavailable to the respondent in the complaint, the court also granted the respondent a motion for discontinuance completely outside the limits of the complaint.

On page 4, the Findings (Appendix, *infra*, 5a) state:

"On the subsequent trial before me, plaintiff moved to withdraw all its claims — for an all-

encompassing declaratory judgment, injunction, and compensatory damages — except that relating to a declaration of rights as to the moneys in the escrow account. I granted that motion."

That is not what the court's order (A52, Appellant's Appendix to App. Div.) says:

"The plaintiff above named having moved for an order discontinuing so much of this action: (1) as seeks declaratory relief on the first cause of action except as to the Ideal Shoe Company and C.R. Anthony Shoe Company accounts; (2) as seeks injunctive relief, etc. . . .

ORDERED that so much of the above entitled action (1) as seeks declaratory relief on the first cause of action except as to the Ideal Shoe Company and C.R. Anthony Shoe Company accounts; (2) as seeks injunctive relief — etc."

Whether the motion was for the "moneys in the escrow account", as the Findings say, or the "Ideal Shoe Company and C.R. Anthony Shoe Company accounts" as the order of discontinuance says, is immaterial. The court's granting of the motion had no substance in the complaint, itself. The complaint (par. 15) asked for a "judicial determination" as to the ownership of the accounts receivable — not Ideal, or Anthony, or any of the other 35 — just, 'who owned the goods?', period! The court was bound by the complaint, and ignored it. Paragraph 15 of the complaint was read to the court (*supra*, p. 27) and ignored, leading to the granting of a motion for discontinuance for which there was no justification.

The Uniform Commercial Code

At every stage of this lawsuit, from receipt of complaint to trial, the petitioners had total protection under the Uniform Commercial Code, stymied only by two major calamities, one at each end; the failure of their original attorneys to understand the Code, and the refusal of the trial court judge to permit the citing of the Code ("I would like to read the law on which I based my case" — "No, sir." (T37).

In December 1967, sales agent Walker assigned four footwear manufacturers contracts to American. American established documentary letters of credit in favor of the manufacturers, and imported the goods which created the accounts receivable at issue. The Uniform Commercial Code says that American had total protection from the moment the manufacturer's contracts were assigned, until ten days after American received or should have received payment from their customers.

1. The assignment was protected.

"UCC 9-318

(1) . . . the rights of an assignee (American) are subject to:

(a) all the terms of the contract between the account debtor (manufacturer) and assignor (Walker).

(4) A term in any contract between an account debtor and an assignor which prohibits assignment of an account or contract rights to which they are parties is ineffective."

2. The contract was protected prior to manufacture.

"UCC 9-106

'Contract right' means any right to payment under a contract not yet earned by performance and not evidenced by an instrument."

The "instrument" is the single most important document in a letter of credit transaction. It is the carrier to which all documents required by a documentary letter of credit are attached when negotiated against the letter of credit.

The demands of an "instrument" are covered in UCC 3-104 (refer Appendix, *infra*, 23a).

3. The contract was protected after manufacture, prior to shipment of goods.

"UCC 9-106

Account means any right to payment for goods . . . which is not evidenced by an instrument."

4. The contract was protected during negotiation between manufacturer's bank and American's bank.

"UCC 9-309

Protection of Purchasers of Instruments and Documents.

Nothing in this Article limits the rights of a holder . . . to whom a negotiable document of title has been duly negotiated . . . and such holders or purchasers take priority over an earlier security interest even though perfected. . . ."

5. American was protected when the documents of title (bills of lading) were surrendered to take possession of the footwear.

"UCC 9-305

When Possession by Secured Party Perfects Security Interest Without Filing.

A security interest in . . . goods . . . may be perfected by the secured party's taking possession of the collateral. . . . A security interest is perfected by possession from the time possession is taken without relation back. . . ."

6. American was protected when the collateral was delivered to their buyers and invoiced to collect their proceeds.

"UCC 9-306

'Proceeds'; Secured Party's Rights on Disposition of Collateral.

(3) The security interest in proceeds is a continuously perfected security interest if the interest in the original collateral was perfected but it ceases to be a perfected security interest and becomes unperfected ten days after receipt of the proceeds by the debtor. . . ."

Under the Code, a "debtor" is one who "owes payment", or one who "owes other performance of the obligation" or the owner of the collateral with the obligation to complete a contract to create the ultimate "debtor," the one who "owes payment."

"UCC 9-105 (d)

'Debtor' means the person who owes payment or other performance of the obligation secured. . . .

Where the debtor and the owner of the collateral are not the same person, the term 'debtor' means the owner of the collateral. . . ."

Lawsuits Which Resulted From This Infamous (1968) Action

Which came first, the chicken or the egg?

In 1968, respondent Commercial initiated this action, the initial step in a plot to convert almost \$500,000.

In 1968, petitioner American's law firm had available the Uniform Commercial Code to nip that plot in the bud, but did not use it.

Regardless of which to condemn from this lawsuit, more than sixteen additional lawsuits have resulted, to date, including the following:

Supreme Court of New York State — New York County

American East India Corporation v. Commercial Trading Co.

Ind. No. 21279/71 — \$4,500,000

Basis: Fraud; inducing breach of contract; conversion.

Disposition: Complaint dismissed, statute of limitations

Connelly v. American East India Corporation

Ind. No. 3202/76 — \$28,000

Basis: Breach of assignment agreement

Disposition: Ended in mid-trial stipulation

Connelly v. Weil, Gotshal & Manges ("Weil Gotshal")
Ind. No. 7903/76 — \$250,001

Basis: From May 1974, Weil Gotshal took on the representation of Commercial in New York Action No. 1. While there would seem to be some justification for a law firm to represent a known guilty defendant, there would not seem to be any justification for a law firm to represent a plaintiff engaged in a fraudulent action.

Before Weil Gotshal put a single paper into court for Commercial, they had received a copy of the Perjury Papers (*supra*, p. 23). Within two months, they had seen the 56 exhibits to support the Perjury Papers and had conducted a deposition of Connelly on the Perjury Papers.

When, on January 31, 1976 only three weeks before trial, Weil Gotshal moved for summary judgment in this action (*supra*, p. 24), and exhibited the entire 53-page memorandum decision of the Philadelphia Action (400 F. Supp. 141) knowing the decision was based on the perjury of Grossman, Connelly initiated the action against Weil Gotshal.

Noticed for: "Malpractice resulting in presentations prejudicial to administration of justice."

Disposition: Complaint dismissed for failure to state "a viable cause of action."

Grossman et al. v. Connelly et al.

Ind. No. 16587/74 — \$20,000,000

Noticed for: "Publication by defendants of false statements understood by third parties to accuse plaintiffs of the crime of perjury."

Disposition: Plaintiff moved (granted) for Connelly to be deposed to "aid" in preparation of complaint. Connelly deposed January 29, 1975. No complaint received to date.

Connelly v. William Lynn et al.

Ind. No. 13493/76 — \$43,960.68

Noticed for: "Conversion, perjury and collaboration to detriment of employer."

Disposition: Mutually agreed settlement.

Connelly v. Commercial Trading Co.

Ind. No. 22472/76 — \$163,304.80

Noticed for: "Release of funds" (Funds held by Commercial to credit of Walker Trading)

Disposition: Complaint dismissed, statute of limitations.

Connelly v. Commercial Trading Co.

Ind. No. 22473/76 — \$127,695.33

Noticed for: "Release of funds" (Funds held by Commercial to credit of Walker officers)

Disposition: Complaint dismissed, statute of limitations.

Connelly v. Chadbourne, Parke, Whiteside & Wolff

Ind. No. 15995/77 — \$4,519,071.40

Basis: Malpractice and negligence in failures to prosecute New York Actions Nos. 1 and 2

Disposition: Complaint dismissed, court ruling that causes of action occurred prior to October 1974 assignment of actions to Connelly.

Connelly v. Leahey & Johnson

Ind. No. 572/78 — \$4,515,000

Basis: Malpractice and negligence in failures to prosecute New York Actions Nos. 1 and 2

Disposition: Complaint dismissed, improper service.

Connelly v. Commercial Trading Co.

Ind. No. 5417/78 — \$16,750.56

Basis: Recovery of six accounts receivable discontinued from New York Action No. 1 trial, Feb. 21, 1978

Disposition: Complaint dismissed — statute of limitations and *res judicata*

Connelly v. American East India Corp.
 Ind. No. 6482/78 — \$51,739.40
 Noticed for: Release of funds held in trust.
 Disposition: Awaiting trial

United States District Court For Eastern Pennsylvania

American East India Corp. v. Ideal Shoe Co.
 ("Philadelphia Action")
 C/A 71-856 — \$27,542.40
 (For details, see *supra*, p. 21)

Connelly v. Ideal Shoe Co.
 C/A 78-304 — \$14,142.80
 Basis: UCC 9-306 (3); recovery of proceeds lost in Philadelphia Action.
 Disposition: Motion to dismiss complaint on "bars of *res judicata* and the statute of limitations" granted, no opinion.

Connelly v. Wolf, Block, Schorr & Solis-Cohen
 C/A 78-2175 — \$32,000
 Basis: Malpractice and negligence in prosecution of Philadelphia Action.
 Disposition: Awaiting trial.

REASONS FOR GRANTING THE WRIT

Trial

By the opening sentence of its "Findings of fact. . ." (Appendix, *infra*, 2a):

"This decision finally puts at rest — hopefully — an inordinately complex, 10-year old, series of lawsuits,"

the trial court certainly must have realized that much more than this instant action was involved. Rather than hear the parties on the complaint, and make a strong decision, the court grasped at a straw of making an unsigned memorandum decision the "law of the case." Rather than hear facts and law, the court granted summary judgment. Rather than accept the decision of an associate judge, Justice Grossman, that "there is no cause of action in the complaint seeking recovery under principles of collateral estoppel and summary judgment" and the prior decisions in *Progressive v. Mt. Vernon Clock* and *Ohringer v. Kass* that summary judgment is not available on an unpleaded claim, the court held to the unsigned memorandum decision.

Despite gagging the petitioners to limit testimony of presenting cost figures to import footwear, and hearing no respondent witness, the court prepared a six-page "Findings of fact and conclusions of law," but gave no source for the findings. Certainly it is obvious from reading the findings that many of them came from respondent's papers filed over a ten-year period. Certainly the falsity of the Findings could have been exposed if uttered by a witness.

In 1972, respondent Commercial filed this action as an equity case, and it was calendared as such, "E-13302." In *Salzman v. Sakofsky* (89 N.Y.S. 2d 39), it was held that "In an equity case, in order to effect a disposition on the merits, findings of fact are essential in decision of court." Rather than hear facts to dispose of the case on the merits, the court shut off all facts and law by granting summary judgment.

In *Kohlmann v. City of New York* (184 N.Y.S. 2d 357; 8 A.D. 2d 598), it was held that "Parties to a trial, civil or criminal, have a right to have the case determined on the facts and law applicable thereto." While the respondent had no desire to put a witness on the stand, certainly the petitioners should have the opportunity to have this case determined on the facts and law.

Uniform Commercial Code

In dollar volume, the documentary letter of credit is the largest secured transaction in the world. Millions of dollars worth are established daily. The yearly volume is in the trillions. The uniform handling and *operation* of documentary letters of credit is controlled by The International Chamber of Commerce Brochure No. 222. Every documentary letter of credit carries the statement:

"This credit is subject to the Uniform Customs and Practice For Documentary Credits (1962 Revision) International Chamber of Commerce, Brochure No. 222."

Adherence of the United States banks to those regulations became effective July 1, 1963. But those rules refer to *operation* not *protection*.

When the framers of the Uniform Commercial Code undertook their decade-long (1942-52) project, to compile Article 9, Secured Transactions, they brought in committees of "hard-headed businessmen and operating bankers." (UCC 1972 Official Text, General Comment, page xvii). Through their efforts, Article 9 gives to every party who purchases goods for resale, financed by a letter of credit, complete protection from "contract rights" (UCC 9-106) in a contract prior to manufacture on through 10 days after collection of "proceeds" of the sale [UCC 9-306 (3)].

When Governor Rockefeller signed the Uniform Commercial Code legislative bill into law in 1964, that complete protection was extended to every user of a letter of credit in New York State, including the petitioners herein.


When petitioner American established the letters of credit to create the accounts receivable at issue in this action, they had

every right to the protection of the law. When petitioner Connelly took assignment of American's interest in this action, in October 1974, he did so in the confident belief that when this case did get to trial, the courts would uphold the law. By the trial court granting summary judgment to the plaintiff-respondent, the protection of the law became a mockery. That mockery could, and should, be obliterated and the protection of the law returned to this defendant-petitioner and all future parties who look to the Uniform Commercial Code for protection.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

s/ Eugene W. Connelly
 for Petitioners

la

APPENDIX

OPINIONS IN THE LOWER COURTS

STATE OF NEW YORK COURT OF APPEALS

Motion for Leave to Appeal:

No. 116 — February Term, 1979

Decided — April 3, 1979 — Denied; no opinion.

Motion for Reargument:

No. 399 — April Term, 1979

Decided — May 3, 1979 — Denied; no opinion.

**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION — FIRST DEPARTMENT**

Appeal of Trial Court Decision:

November Term, 1978

Decided — November 21, 1978 — Order 3928 —
Affirmed; no opinion.

Motion for Reargument:

December Term, 1978

Decided — January 11, 1979 — Order M-4323 —
Denied; no opinion.

TRIAL COURT'S "FINDING OF FACT AND
CONCLUSIONS OF LAW"

SUPREME COURT OF NEW YORK
COUNTY OF NEW YORK

Trial Term Part XVIII

Dated and Filed: March 21, 1978

Index No. 10534/72

COMMERCIAL TRADING COMPANY, INC.,

Plaintiff,

-against-

AMERICAN EAST INDIA CORPORATION and EUGENE
W. CONNELLY,

Defendants.

SHAINSWIT, J.:

This decision finally puts at rest — hopefully — an inordinately complex, 10-year old, series of lawsuits.

The instant complaint was served in April 1968. Plaintiff Commercial Trading Co., a factoring corporation, had in essence lent money to the Walker Trading Corp. from February 1964 to July 1967, in return for a security interest in "... all present and future accounts and contract rights" of Walker. The latter's business was ordering goods from manufacturers in the Orient to fill orders it had received from American companies; plaintiff financed these purchases by taking out letters of credit

Trial Court's "Finding of Fact and Conclusions of Law"

on the particular transactions. The financing statement was filed on the first permissible day after enactment of the Uniform Commercial Code, and was appropriately renewed.

In connection with large orders to Walker from the Ideal Shoe Co. and C. R. Anthony Co., plaintiff Commercial asked Walker to provide additional margin (apparently because plaintiff was becoming generally — and rightly — concerned about Walker's shaky financial position). To provide this margin, Walker arranged, between September and December 1967, to assign certain purchase orders — including the Ideal and Anthony orders — to defendant American East India Corp., an export-import company. American was not informed of the arrangement between Walker and plaintiff. American took over these transactions, arranging for the financing, manufacturing, and importing. Then, in February, 1968, Commercial found out about this, and promptly notified Ideal and Anthony, *inter alia*, about its claim of priority. Ideal then paid Commercial, and Anthony's payment was placed in an escrow fund (the escrow agents are Chadbourne, Parke, Whiteside, and Wolff, and Wachtell, Lipton, Rosen and Katz).

Defendant American sued Ideal in the federal district court for the Eastern District of Pennsylvania, and plaintiff took over defense of that suit, under an indemnity arrangement with Ideal. Somewhat earlier, plaintiff Commercial had brought the instant suit against American in this Court, seeking (a) a declaratory judgment establishing its superior interest in the escrow and other accounts, (b) an injunction prohibiting defendant from attempting to collect on the various purchase orders, and (c) compensatory damages for tortious interference with its contract rights. Finally, American filed its own suit against Commercial in New York for conversion.

Trial Court's "Finding of Fact and Conclusions of Law"

The federal action came to trial first, and was decided in July 1975 (*American East India Corp. v. Ideal Shoe Co.*, 400 F. Supp. 141). District Judge Green there held that Commercial, the factoring company (plaintiff here, defendant in the federal case) had a claim against American, the export-import company (defendant here, plaintiff in the federal suit) for conversion of its contract rights, because its legal interest had priority; and that the measure of damages was the value of the contract before the expenditure by American. The latter was found by the federal court to have acted in good faith; as an innocent converter, it was entitled to recover its expenditures. Commercial thereupon paid American its expenses on the Ideal account, the appeal was withdrawn and the matter is now concluded.

On the basis of the federal decision, Commercial moved in this Court for summary judgment, which was granted on April 1, 1976. Mr. Justice Rosenberg held that the federal ruling constituted collateral estoppel, and that its findings of fact and conclusions of law were therefore binding on the Anthony purchase orders also, both as to liability and as to the measure of damages. He referred the determination of damages in July 1976 to Special Referee Byer. After hearings, the Referee issued an order on March 29, 1977, stating that the matter had been settled before him by division of the \$66,363.11 escrow money — \$55,000 was to go to American — and the exchange of general releases.

Sometime earlier, American had assigned its claim to its former president, Eugene Connelly, who had, on motion, been added as a party defendant to this litigation. Mr. Connelly, although a party to all the hearings and negotiations, refused to carry out the settlement by signing releases. Plaintiff chose not to pursue the settlement, and the case came back on the Court's calendar. Mr. Connelly made numerous motions, all unsuccessful; *inter alia*, he moved to amend the answer in this case by adding counterclaims and affirmative defenses; that motion was denied by Mr. Justice Rubin in January, 1978.

Trial Court's "Finding of Fact and Conclusions of Law"

On the subsequent trial before me, plaintiff moved to withdraw all its claims — for an all-encompassing declaratory judgment, injunction, and compensatory damages — except that relating to a declaration of rights as to the moneys in the escrow account. I granted that motion. Proceeding then with the determination of the sole issue left to be tried, I urged Mr. Connelly to present his former company's costs in filling the Anthony account. Mr. Connelly — who appeared *pro se* — then testified himself, presenting some supporting documentation. His testimony was supplemented, on the Court's request, by that of Henry Baccash, now president of the import company, and comptroller at the time of all the events in question, who appeared as a Court witness.

The actual proof of costs presented by Mr. Connelly was initially conclusory. However, once it was supplemented by Mr. Baccash's testimony, it sufficed to establish total costs of \$51,239.15. These costs consisted of the cost of the goods (shoes), financing charges, duty charges, ocean shipping and forwarding charges, and insurance. Mr. Baccash explained how he had allocated costs to the Anthony orders, and also identified his handwritten notations on the documentary proof, both establishing the allocations and stating the particular costs — all of it, he testified, placed there at the time of the transactions in 1968. He also identified various billings and statements as attributable to the Anthony orders, based on his own memory and knowledge. He was an intelligent and careful witness, and I fully credited his testimony; it more than substantiated Mr. Connelly's generalized testimony.

The evidence presented by Mr. Connelly involved 6 of the 7 Anthony purchase orders. It developed that \$10,710.00 in the escrow fund represents the seventh order; Mr. Connelly conceded that his company had refused to purchase that order, but sought to claim \$2,012.64 from the escrow fund in that

Trial Court's "Finding of Fact and Conclusions of Law"

connection nevertheless, on the ground that American had lent that sum to Walker, for shipping charges on the seventh order, after Commercial had declined to finance it and Walker had done its own financing. That claim is obviously outside the parameters of Mr. Justice Rosenberg's order, and in any event was wholly unsupported by documentary proof; it is therefore rejected.

The Court notes that Mr. Connelly is an unfortunate figure. The problems of this litigation have obviously caused him great emotional disturbance. Indeed, he stated to the Court that he is now retired and that this case has become the main interest in his life. Since defendant company, under his leadership, innocently lost large sums of money, compounded by a decade of litigation, his bitterness and confusion are understandable. The Court has therefore made some allowance for the limitations of his *pro se* handling of this matter.

Careful analysis of all of the testimony and documentation lead the Court to the conclusion that there is sufficient basis for the claimed cost of \$51, 239.15. The balance of the \$66,363.11 in escrow may be delivered to plaintiff Commercial.

This decision constitutes the Court's findings of fact and conclusions of law.

Settle a judgment promptly, declaring the rights of the parties in connection with the foregoing.

Dated: March 21, 1978

J.S.C.

**THE "NON-ORDER" MEMORANDUM DECISION OF
JUDGE ROSENBERG**

SUPREME COURT : NEW YORK COUNTY

INDIVIDUAL CALENDAR : PART 6

COMMERCIAL TRADING COMPANY, INC.,

Plaintiff,

-against-

AMERICAN EAST INDIA CORPORATION,

Defendant.

INDEX NO.
10534/72

ROSENBERG, J.:

Motion for summary judgment by the plaintiff is granted.

The decision rendered in an action brought in the U.S. District Court for the Eastern District of Pennsylvania, Civil Action No. 71-856, American East India Corporation v. Ideal Shoe Company constitutes a collateral estoppel here (References to that decision shall hereinafter read A-I, p.)

Both the plaintiff and the defendant here claimed the right to be paid by the defendant Ideal in the Pennsylvania action. In fact, Ideal made payment to the plaintiff Commercial in return for Commercial's agreement to indemnify and defend Ideal (A-I, p. 17, 20). Ideal, defended by Commercial, asserted, and the Court there accepted, that Commercial may raise the same issues as defenses as might be asserted in a suit between American and Commercial (A-I, p. 20-21).

The "Non-Order" Memorandum Decision of Judge Rosenberg

The Court in that decision made extensive reference to the facts and made both findings of fact and conclusions of law. A copy of the decision is incorporated herein. Because of the agreement between Commercial and Ideal, the defense conducted by Commercial and importantly the admission by that Court, without objection from American, of the interposition on behalf of Ideal of all defenses available to Commercial, a collateral estoppel was effected and the determination there made is here binding on both parties. The rules governing the application of the doctrine have been simplified and plainly enunciated:

"New York law has now reached the point where there are but two necessary requirements for the invocation of the doctrine of collateral estoppel. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action and, second, there must have been full and fair opportunity to contest the decision now said to be controlling." (Schwartz v. Public Administrator, 24 N Y 2d 65, 71)

In the Pennsylvania action the Court rules that American was entitled to payment in the amount invoiced Ideal ("the contract price", A-I, p. 51) less American's cost which consisted of purchase price, bank charges, duty ocean shipping and forwarding and insurance (A-I, p. 17).

The Court is aware that the Pennsylvania action involved the "contract right" on the Ideal order alone. An examination and analysis of the decision demonstrates that the findings of fact are also binding as to the Anthony purchase order. The dealings between American and its assignor included both purchase orders at the same time. The findings of fact and

The "Non-Order" Memorandum Decision of Judge Rosenberg

conclusions of law determined in the Pennsylvania decision therefore necessarily determine the facts and law as to both purchase orders since it was the dealing between American and its assignor which were determinative of the rights of the parties.

Since this action involves both the Ideal and Anthony purchase orders the judgment to be entered herein shall combine the proceeds and costs of the two orders in determining the amount of the judgment. The Pennsylvania decision has already determined a net amount including interest on the Ideal order. The net amount should be determinable on affidavits on the Anthony order since the components are all subject to proof by documentary evidence. Since the Anthony payment has been held in Escrow in an interest bearing account by agreement between Commercial and American, no interest shall be awarded but the interest earned in that account shall be divided pro rata between Commercial and Anthony to the division of the Anthony payment.

The Pennsylvania decision serves not only as a collateral estoppel on the issue of liability here, the decision also serves to establish the method by which damages are to be here determined. Utilizing that rationale, the parties are directed to submit additional affidavits within 20 days after publication of this decision in the New York Law Journal, supported by documentary evidence to permit the fixing of the amount to be awarded. Entry of an order is reserved pending submission of those materials.

Dated: April 1, 1976.

s/ S.R.
J.S.C.

**ORDER OF JUDGE GROSSMAN DENYING SUMMARY
JUDGMENT TO RESPONDENT**

SUPREME COURT : NEW YORK COUNTY

INDIVIDUAL CALENDAR : PART 6

COMMERCIAL TRADING COMPANY, INC.,

Plaintiff,

-against-

AMERICAN EAST INDIA CORPORATION and EUGENE
CONNELLY,

Defendants.

Index No.
10534/72

GROSSMAN, J:

The October 28, 1977 motion by Mr. Connelly is a "renewal" of a motion for summary judgment denied because of the absence of pleadings, and based on an unpleaded claim. The cross motion by plaintiff also was previously denied for failure to show an affirmative pleaded claim.

Mr. Connelly does not understand what is meant by an affirmative pleading. It is his *own* complaint or his *own* counterclaim for affirmative relief. He has no affirmative complaint or counterclaim.

Plaintiff renews its cross motion for summary judgment under the principles of collateral estoppel. There is no cause of action in the complaint seeking recovery under principles of

*Order of Judge Grossman Denying Summary Judgment to
Respondent*

collateral estoppel and summary judgment is not available on an unpleaded claim (Progressive Co. v. Mt. Vernon Clock Corp., 5 A D 2d 166; Harry Ohringer Inc. v. Kass, 28 A D 2d 117).

Furthermore, plaintiff has made a motion for summary judgment on its complaint. It cannot make successive motions for summary judgment thereon (Jerome v. Lewis, 32 A D 2d 648; Levitz v. Robbins Music Corp., 17 A D 2d 801).

Both motions are denied.

Dated: December 13, 1977

LOUIS GROSSMAN
Acting Justice of the Supreme
Court of the State of New York
J.S.C.

12a

**ORDER OF JUDGE GROSSMAN GRANTING MOTION
FOR PREFERENCE TO PETITIONERS**

NEW YORK SUPREME COURT
COUNTY OF NEW YORK

INDIVIDUAL CALENDAR PART 6

COMMERCIAL TRADING CO., INC.,

Plaintiff,

-against-

AMERICAN EAST INDIA CORPORATION and EUGENE
W. CONNELLY,

Defendants.

Present:

Hon. LOUIS GROSSMAN
Justice

Papers numbered

Notice of Motion and Affidavits Annexed	1-4
Answering Affidavits	5
Replying Affidavits	6-7

Upon the foregoing papers this Motion for a preference is granted to the extent of directing the calendar clerk to place this case on the appropriate trial calendar for early trial subject to the approval of the Justice presiding thereat. A copy of this order with notice of entry shall be served on the calendar clerk within ten days of publication hereof.

13a

*Order of Judge Grossman Granting Motion for Preference to
Petitioners*

Dated: 12-13-77

LG
J.S.C.

County Clerk's No. 10534-1972

COMPLAINT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

COMMERCIAL TRADING COMPANY, INC.,

Plaintiff,

-against-

AMERICAN EAST INDIA CORPORATION,

Defendant.

Plaintiff, by its attorneys, WACHTELL, LIPTON, ROSEN, KATZ & KERN, complaining of the defendant, alleges:

FOR A FIRST CAUSE OF ACTION:

1. Plaintiff is a corporation, duly incorporated under the laws of the State of New York, with its principal office for the transaction of business at 1440 Broadway, New York, New York.

2. Upon information and belief, defendant American East India Corporation (hereinafter "American") is a New York corporation with its principal office for the transaction of business at 25 Broadway, New York, New York:

3. Walker Trading Corporation (hereinafter "Walker") is a New York corporation with its principal office for the transaction of business at 47 West 34th Street, New York, New York.

Complaint

4. At all times hereinafter mentioned plaintiff was and still is the owner of a valid and perfected prior security interest in the accounts receivable, contract rights, and inventory of Walker and all documents of title and the goods evidenced thereby belonging to Walker together with the proceeds of such accounts receivable, contract rights, inventory, documents of title and goods.

5. Said security interest was created by virtue of the following instruments:

(a) Accounts Receivable Agreement dated February 19, 1964 between Walker and Plaintiff. (A copy of said Accounts Receivable Agreement is annexed hereto as Exhibit "A" and made a part of this complaint);

(b) Security Agreement (Inventory) dated December 30, 1966 between Walker and Plaintiff. (A copy of said Security Agreement (Inventory) is annexed hereto as Exhibit "B" and made a part of this complaint);

(c) Financing Statements covering the property described in the Accounts Receivable Agreement set forth in paragraph 5(a) hereof, which were duly filed in the office of the Secretary of the State of New York on September 28, 1964 and in the office of the City Register of the City of New York, New York County on September 16, 1964. (Copies of said Financing Statements bearing acknowledgements of filing are annexed hereto as Exhibit "C" and made a part of this complaint); and

(d) Financing Statements covering the property described in the Security Agreement (Inventory) set forth in paragraph 5(b) hereof, which were duly filed in the office of the Secretary of the State of the State of New York and in the office of the City Register of the City of New York, New York County, on

Complaint

January 20, 1967. (Copies of said Financing Statements bearing acknowledgments of filing are annexed hereto as Exhibit "D" and made a part of this complaint).

6. By virtue of the advance of monies by plaintiff to Walker and pursuant to the terms of the Accounts Receivable Agreement and Security Agreement (Inventory) (hereinafter collectively referred to as the "Security Agreements") Walker is presently indebted to plaintiff in the amount of approximately \$310,000, which sum is payable upon plaintiff's demand.

7. Upon information and belief in or around December 1967, defendant American, at the request of Walker, opened up letters of credit on behalf of Walker for the purchase by Walker from foreign manufacturers of certain goods to be sold by Walker to Walker's customers under an arrangement whereby defendant American was to receive a fee or finance charge for its furnishing of the said letters of credit.

8. Upon information and belief subsequent thereto and during the period between and including November 1967 and March 1968 Walker sold to certain of its customers footwear, shoes and other goods (hereinafter collectively referred to as "the Goods") for an aggregate price which is not presently capable of being precisely ascertained by plaintiff but believed to be approximately \$200,000, all of which amounts are now due and owing by said customers (said customers are referred to hereinafter as "the account debtors").

9. By virtue of plaintiff's advances of money, the Security Agreements and the filed Financing Statements as aforesaid, plaintiff acquired a prior security interest in the Goods, documents of title representing the Goods, and all account receivable arising out of the sale of the Goods and was and is entitled to collect the said accounts receivable from the account debtors thereon.

Complaint

10. A dispute has arisen between plaintiff and defendant American with respect to the ownership of the said accounts receivable arising out of the sale of the Goods by Walker to the account debtors.

11. Defendant American has asserted and claimed that the Goods were imported, paid for, and "were the possession of" defendant American and that the accounts receivable arising from the sales thereof belong to defendant American. Defendant American has further asserted and claimed that Walker was never the owner of the Goods but was merely acting as defendant American's agent in the sales of the Goods and that plaintiff is entitled to receive only the amount of Walker's alleged "commissions" on such sales of approximately 15% of the face amount of said accounts.

12. Plaintiff asserts, claims and hereby alleges that defendant American was neither the owner of the Goods nor the seller of the Goods; that the orders for the Goods were sent by the account debtors to Walker; that the sales contracts for the purchase of the Goods from the foreign manufacturers were in Walker's name; that defendant American merely provided Walker with letters of credit to enable Walker to pay for the Goods; that each of the invoices for the sale of the Goods to the account debtors was on Walker's stationery, and was in Walker's name; that no security agreement of any kind existed between defendant American and Walker; and that defendant American has no security interest whatsoever in the Goods, the proceeds thereof, or the accounts receivable arising out of the sale thereof.

13. Upon information and belief defendant American has notified the account debtors that they should pay the said accounts to it. Upon learning of such notification by defendant American plaintiff notified said account debtors to make such payment to plaintiff. Said account debtors have refused to make payment of the said accounts until the dispute between plaintiff

Complaint

and defendant American has been resolved for fear of incurring double liability on said accounts in the event such payment were to be made to the party not entitled thereto.

14. Upon information and belief, all of said account debtors are foreign corporations not qualified or doing business in the State of New York and are not amenable to service of process of this Court.

15. Because of the dispute that presently exists as aforesaid between plaintiff and defendant American with respect to the ownership of said accounts receivable and the right to receive payment thereof, a judicial determination of such dispute is desirable and necessary so that the right of plaintiff to the payment thereof be settled and so that the account debtors liable thereon may be free to pay same to the party entitled thereto without fear of incurring double liability for such payments.

16. Plaintiff has no adequate remedy at law.

FOR A SECOND CAUSE OF ACTION

17. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "16" inclusive of this complaint.

18. Defendant American, by virtue of its notification and demand that the said account debtors of Walker pay the accounts to it rather than plaintiff, has interfered with and unless enjoined from doing so, will continue to interfere with plaintiff's security interest in the accounts receivable of Walker thereby causing plaintiff irreparable injury.

19. Plaintiff has no adequate remedy at law.

FOR A THIRD CAUSE OF ACTION

Complaint

20. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "19" inclusive of this complaint.

21. The Security Agreements between plaintiff and Walker provide that during their terms, Walker may not sell, pledge, assign, transfer or otherwise encumber or dispose of any of Walker's accounts other than to plaintiff and Walker may not borrow any money on such accounts from any party other than plaintiff.

22. Upon information and belief, at all relevant times herein defendant American had due notice of the Security Agreements between plaintiff and Walker.

23. Upon information and belief, notwithstanding the fact that defendant American had due notice and knowledge of the Security Agreements between plaintiff and Walker, defendant American wrongfully, knowingly, intentionally, maliciously, and without reasonable justification or excuse induced, persuaded and enticed Walker to violate, repudiate and breach the Security Agreements between Walker and plaintiff and to refuse to proceed further thereunder, in that, among other things Walker borrowed money from defendant American to finance its purchase of the Goods on the security of its accounts receivable and intends to borrow money in the future from defendant American and others on the security of its accounts receivable, has refused to borrow money from plaintiff on such security and has stated that it will not in the future borrow money from plaintiff on such security.

24. By reason of the fact that Walker was induced to violate, repudiate and breach the Security Agreements as aforesaid, plaintiff was deprived of the interest, charges and fees it would have received had Walker borrowed the money from

Complaint

plaintiff to finance its purchase of the Goods and plaintiff was and will in the future be further deprived of the interest, charges and fees which it could have expected to receive in connection with money which it would have lent to Walker had Walker not violated, repudiated and breach the Security Agreements as aforesaid.

25. By virtue of the foregoing, plaintiff has been damaged in an amount not presently capable of being accurately ascertained but believed to be in excess of \$40,000.

WHEREFORE, plaintiff demands judgment against defendant American:

1. Granting a declaratory judgment in favor of plaintiff, adjudging and declaring:

(a) That plaintiff has a security interest in the accounts receivable of Walker arising out of the sale of the Goods;

(b) That plaintiff's said security interest therein is prior and superior to whatever interest defendant American may have therein; and

(c) That as between plaintiff and defendant American, plaintiff is entitled to have the amounts owing on the said accounts paid to plaintiff.

2. Enjoining defendant American, its officers, agents, servants, employees, attorneys and all persons in active concert or participation with defendant American to whom notice of such injunction shall come, during the pendency of this action and permanently thereafter, from taking any steps to cause the account debtors to pay the accounts to defendant American rather than plaintiff, or to take any other action which would interfere with plaintiff's security interest in the accounts receivable of Walker:

Complaint

3. In an amount not less than \$40,000, together with appropriate interest thereon.

4. For the costs and disbursements of this action.

5. For such other, different and further relief as the Court may deem just and proper.

WACHTELL, LIPTON,
ROSEN, KATZ & KERN
Attorneys for Plaintiff
Office and P.O. Address
230 Park Avenue
New York, New York 10017
Tel. No. 889-4300

(Verified by Gerald J. Grossman, as Vice-President, April 4, 1968)

STATUTES INVOLVED

UNIFORM COMMERCIAL CODE

Applicable Sections (In Pertinent Part)

Letter of Credit Protection

"UCC 9-106

'Contract right' means any right to payment under a contract not yet earned by performance and not evidenced by an instrument. . . ."

"UCC 9-106

'Account' means any right to payment for goods . . . which is not evidenced by an instrument. . . ."

"UCC 9-304

Perfection of Security Interest in Instruments, Documents and Goods Covered by Documents

(1) . . . A security interest in instruments . . . can be perfected only by the secured party's taking possession. . . ."

"UCC 9-309

Protection of Purchasers of Instruments and Documents

Nothing in this Article limits the rights of a holder . . . to whom a negotiable document of title has been duly negotiated . . . and such

Statutes Involved

holders take priority over an earlier security interest even though perfected. Filing under this Article does not constitute notice of the security interest to such holders. . . ."

The "Instrument"

(The single most important document in UCC Article 9, Secured Transactions. The only document which requires *possession* to perfect a secured interest, UCC 9-304, *supra*.)

"UCC 3-104

Form of Negotiable Instruments; 'Draft'; 'Check'; 'Certificate of Deposit'; 'Note'.

(1) Any writing to be a negotiable instrument within this Article must

(a) be signed by the maker or drawer; *and* [emphasis added]

(b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this Article, *and*

(c) be payable on demand or at a definite time; *and*

(d) be payable to order or to bearer.

(2) A writing which complies with the requirements of this section is

Statutes Involved

(a) a 'draft' ('bill of exchange') if it is an order; . . ."

Other

"UCC 1-201

(37) 'Security interest' . . .

The term also includes any interest of a buyer of accounts. . . ."

"UCC 2-201

Formal Requirements

(1) . . . a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed. . . ."

"UCC 9-105

(a) 'Account debtor' means the person who is obligated on an account. . . .

(c) 'Collateral' means the property subject to a security interest and includes accounts, contract rights . . . which have been sold.

(d) 'Debtor' means the person who owes payment or other performance of the obligation secured . . . and includes the seller of accounts. . . . Where the debtor and the owner of the collateral are not the same person, the term 'debtor' means the owner of the collateral. . . ."

Statutes Involved

"UCC 9-204

When Security Interest Attaches;

(1) A security interest cannot attach until there is agreement that it attach and value is given and the debtor has rights in the collateral. It attaches as soon as all of the events in the preceding sentence have taken place. . . .

(2) For the purposes of this section the debtor has no rights

(c) in a contract right until the contract has been made.

(d) in an account until it comes into existence."

"UCC 9-302

When Filing is Required to Perfect Security Interest;

(1) A financing statement must be filed to perfect all security interests except the following

(a) a security interest in collateral in possession of the secured party under Section 9-305."

"UCC 9-305

When Possession by Secured Party Perfects Security Interest Without Filing.

UCC 9-203 - Enforceability of Security Interests;

- (1) "....a security interest is not enforceable against the debtor or third parties unless
- (a) the collateral is in the possession of the secured party; or
 - (b) the debtor has signed a security agreement which contains a description of the collateral....

26a

Statutes Involved

A security interest in letters of credit . . . goods, instruments, negotiable documents . . . may be perfected by the secured party's taking possession of the collateral. . . ."

"UCC 9-306

'Proceeds'; Secured Party's Rights on Disposition of Collateral.

(3) The security interest in proceeds is a continuously perfected security interest if the interest in the original collateral was perfected but it ceases to be a perfected security interest and becomes unperfected ten days after receipt of the proceeds"

"UCC 9-318

Defenses Against Assignee;

(1) . . . the rights of an assignee are subject to

(a) all the terms of the contract between the account debtor and assignor."